Supreme Court, U.S.
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Supreme Court of the United States

FRED W. VOIGT, JR., as Personal Representative of the Estate of Steven Mark Voigt, Deceased, FRED W. VOIGT, JR., Individually, ANN M. VOIGT, Individually, and STEVEN MARK VOIGT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *Feres* doctrine should continue to bar the FTCA claims where a navy SEAL died on the high seas as a result of lack of discipline of a navy pilot who was giving illegal thrill rides in violation of NATOPS; Aircraft Limitations, S.O.P.s; and where a total failure of the Navy's Risk Management System contributed to the helicopter crash.

Whether the *Feres* doctrine should be overruled as bad law.

LIST OF PARTIES

The other parties to this proceeding are the Department of the Navy and the U.S.S. Enterprise CVN 65.

Petitioners, FRED W. VOIGT, JR., as Personal Representative of the Estate of Steven Mark Voigt, Deceased, FRED W. VOIGT, JR., Individually, ANN M. VOIGT, Individually, and STEVEN MARK VOIGT, JR., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Appendix A. The opinion of the District Court in *Voigt v. United States Department of the Navy*, Civil Action No. CV198-208 is not published but can be found at Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on August 3, 1999. The Court of Appeals denied a timely petition for rehearing on September 17, 1999, Appendix C.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680.

Death on the High Seas Act, 46 U.S.C. § 761, *et seq.*

Endangered Species Act, 16 U.S.C. § 1531, *et seq.*

STATEMENT OF THE CASE

The fundamental question in this case is whether the *Feres* doctrine should continue to bar servicemen claims under the FTCA.

A. Background

Steve Voigt was a navy SEAL who died on October 26, 1996, in the wreck of a U.S. Navy HH60H helicopter assigned to the U.S.S. Enterprise operating in the Arabian Gulf. The decedent died as a result of the co-pilot of the aircraft (Red Lion 614) performing illegal and prohibited stunts exceeding Naval Aviation Training Operating Procedures Standarized (NATOPS) and performance limits of the aircraft. The illegal maneuvers are referred to as "flat hatting" and are basically "thrill rides".

The primary accountability for the wreck was found to rest with the commanding officer who failed to maintain a command climate which ensured a safe operating environment. Lack of leadership in the Navy's Human Factors Council contributed to the failure to identify an unsafe condition which was occurring. The investigation of the wreck revealed a disturbing history of command where pilots routinely flew aircraft beyond safe limits. The illegal flight activities were given tacit approval through inadequate command action. Safety is a commitment to soldiers and sailors. These prohibited aerial stunts were performed in broad daylight with no restrictions in visibility and in full view of the U.S.S. Enterprise.

B. The Proceedings Below

Suit was filed in the United States District Court for the Southern District of Georgia, Augusta Division with the child of the decedent and the decedent's parents as Plaintiffs. Defendants were the United States Navy, The United States Government and the U.S.S. Enterprise CVN 65. The government filed a motion to dismiss for lack of subject matter jurisdiction which was granted by the Court on January 26, 1999. Appeal was taken to the United States Court of Appeals for the Eleventh Circuit. Dismissal of the action was affirmed August 3, 1999 and on September 17, 1999 the petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

None of the rationales given for applying the *Feres* doctrine to deny a serviceman's claims applies in this matter.

1) "Distinctive federal character" means that the fortuity of the situs should not affect the liability of the government to the servicemen. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. at 672, 97 S. Ct. at 2058 (1977). But here the death was on the high seas and the Death on the High Seas Act determines the liability so that there is no fortuity of the situs it having uniform application.

2) Generous statutory disability and death rationale. The death benefit for servicemen could hardly be said and be generous. A dependent child gets a small monthly payment until the child reaches 18 and he may have some other fringe benefits that sound good, but amount to nothing. But even if veteran benefits were a generous benefit servicemen injured off duty by a civilian army employee could sue the

government under the FTCA even though they had already been compensated by the Veteran Benefits Act. *Brooks v. United States*, 337 U.S. 49, 69 S. Ct. 918 (1949).

3) Military discipline rationale. This is said to be a bar to such suits by servicemen because if suits could be brought on the basis of alleged negligence toward a servicemen by other servicemen, military discipline would be undermined. *Stencel Aero Engineering*. But here we have a death brought about by conspicuous absence of discipline in allowing a helicopter pilot to perform illegal stunts and thrill rides. There can be no "second guess" where there is no "first guess".

I.

THE *FERES* DOCTRINE SHOULD BE OVERRULED.

This Court has pointed out in the dissent in *United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063 (1987) that even federal prisoners can recover under the FTCA for injuries caused by negligence of prison authorities. Not only is this a disturbing anomaly but a person who disturbs a woodpecker protected by the Endangered Species Act is subject to a year in prison and a $25,000.00 fine. Not for killing it or even hurting it but the fines and sentence apply if you disturb the woodpecker's peace and quiet. It is difficult to believe that Congress intended the penalty for disturbing a woodpecker's peace and quiet to be greater than for causing the death of a navy SEAL.

Congress made no exceptions to the FTCA for servicemen and the *Feres* Doctrine is court-made law that should be either overruled or limited in its applications.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 3, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8164
Non-Argument Calendar

D. C. Docket No. 98-00208-CV-1

FRED W. VOIGT, Individually and as Personal Representative of the Estate of Steven Mark Voigt, Deceased, ANN M. VOIGT, STEVEN MARK VOIGT, JR.,

Plaintiffs-Appellants,

versus

DEPARTMENT OF THE NAVY, U.S.S. ENTERPRISE CVN 65, UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(August 3, 1999)

Before BLACK and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

Appendix A

PER CURIAM:

The dismissal of this action is affirmed for the reasons set forth in the ORDER of the district court entered on January 26, 1999.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION DATED AND FILED JANUARY 26, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

Case No.: CV198-208

FRED W. VOIGT, JR., as Personal Representative of the Estate of Steven Mark Voigt, Deceased, FRED W. VOIGT, JR., Individually, and STEVEN MARK VOIGT, JR., Individually,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE NAVY, USS ENTERPRISE CVN 65 and THE UNITED STATES OF AMERICA,

Defendants.

ORDER

Presently before the Court is the Defendant United States of America's Motion to Dismiss (Doc. 5), which the Court construes to be on behalf of all the Defendants.[1] The Plaintiffs

1. Although the motion is not clear as to whether it also applies to the Defendants United States Department of the Navy and the USS ENTERPRISE, the Court has learned that the Defendant United States of America intended to file the motion on behalf of all three Defendants.

have failed to respond to the motion. For the reasons stated herein, the Court **GRANTS** the motion.

BACKGROUND

Plaintiffs' action arises out of a military helicopter crash that occurred on October 25, 1996 in the Arabian Gulf. On that day, Red Lion 614, an HH-60H helicopter from Helicopter Squadron 15, took off from the USS ENTERPRISE, a United States Navy aircraft carrier, to conduct Helicopter Visit, Board, Search and Seizure ("HVBSS") training with the USS NIAGRA FALLS. The Red Lion 614 had twelve people on board — the pilot, co-pilot, two crew members, two exercise observers, and six members of Navy SEAL Team Eight. Steven Mark Voigt was one of the members of the Navy SEAL team aboard the ill-fated helicopter.

The Red Lion 614 returned to the USS ENTERPRISE upon completion of the HVBSS training. Awaiting permission to land, the helicopter was placed in a holding pattern for approximately 20-30 minutes. While in the holding pattern, the helicopter crashed into the Arabian Gulf, killing the pilot, co-pilot, and Steven Voigt. The Plaintiffs allege that an aggressive co-pilot tested the limits of the helicopter by performing various and unauthorized stunts and thrill rides before receiving permission to land. One of these stunts, known as "flat-hatting," allegedly caused the helicopter to plummet to the ocean crushing it on impact.

Due to Steven Voigt's death, the Plaintiffs have brought a wrongful death action seeking $5 million. The action is

brought pursuant to general maritime common law, the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, the Jones Act, 46 U.S.C. § 688, and the Federal Tort Claims Act, 28 U.S.C. § 2674 *et seq.*

On December 24, 1998, the United States filed its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Since that time, the Plaintiffs have not responded in any manner nor have they requested an extension of time. Local Rule 7.5 requires that any party opposing a motion, other than a motion for summary judgment, file a response within fifteen days of service of the motion. If the opposing party fails to file a response, the motion is deemed unopposed.

In their motion, the Defendants contend the Court lacks subject matter jurisdiction pursuant to the *Feres* Doctrine, as promulgated in *Feres v. United States*, 340 U.S. 135 (1950), because the decedent's death occurred during the course of activity incident to his military service. They also argue that the *Feres* doctrine bars recovery by family members whose cause of action is ancillary to the serviceman's action.

DISCUSSION

I. *Motion to Dismiss Standard.*

Federal courts are courts of limited jurisdiction and may only hear cases which they have been authorized to hear by the Constitution or Congress. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S. Ct. 1673, 128

L. Ed. 2d 391 (1994). Federal courts maintain jurisdiction over diversity actions and cases raising a federal question. 28 U.S.C. §§ 1331-32 (1998). If jurisdiction is based on either of these two grounds, the pleader must affirmatively allege facts demonstrating the existence of jurisdiction and include "a short and plain statement of the grounds upon which the court's jurisdiction depends." Fed. R. Civ. P. 8(a); *Taylor v. Appleton*, 30 F.3d 1365 (11th Cir. 1994).

Federal Rule of Civil Procedure 12(b)(1) permits a court to dismiss a complaint if the court lacks subject matter jurisdiction. When analyzing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232-33, 81 L. Ed. 2d 59, 65 (1984); *Beatty v. United States Food and Drug Administration*, 12 F. Supp. 2d 1339, 1342 (S.D. Ga. 1997). A 12(b)(1) motion takes one of two forms — a "facial attack" or a "factual attack." *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1260-61 (11th Cir. 1997). A facial attack on the complaint requires the court to "merely look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id.* at 1261. A factual attack, on the other hand, challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* (internal quotation omitted).

Appendix B

II. *The "Incident to Military Service" Bar.*

A. *The Federal Tort Claims Act.*

Under various circumstances, the Federal Tort Claims Act ("FTCA") waives the sovereign immunity of the United States for the negligent torts of its employees. In the seminal case of *Feres v. United States* 340 U.S. 135, 146, 71 S. Ct. 153, 159, 95 L. Ed. 152 (1950), however, the Supreme Court promulgated the "*Feres* Doctrine" which created an exception for FTCA suits brought by servicemen. The *Feres* doctrine proscribes suits under the FTCA for injuries to members of the Armed Services arising from activities incident to military service. *Id.* As the Supreme Court held in *United States v. Johnson*, 481 U.S. 681, 687-88, 107 S. Ct. 2063, 2067, 95 L. Ed. 2d 648 (1987), "the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries." Recently, the Court of Appeals for the Eleventh Circuit has applied and reaffirmed the applicability of the *Feres* doctrine. *See Jimenez v. United States*, 158 F.3d 1228 (11th Cir. 1998); *Kitowski v. United States*, 931 F.2d 1526, 1529 (11th Cir.), *cert. denied*, 502 U.S. 938, 112 S. Ct. 371, 116 L. Ed. 2d 323 (1991). Consequently, unless the accident involving the decedent did not arise "incident to military service," this Court cannot hear the FTCA claim.[2]

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2. Although Steven Voigt's family is bringing this claim rather than Steven Voigt himself, the *Feres* doctrine still applies. In *Lombard v. United States*, 690 F.2d 215, 223 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118, 103 S. Ct. 3086, 77 L. Ed. 2d 1347 (1983), Judge Ginsburg (now Justice Ginsburg) stated:

(Cont'd)

Appendix B

The Court notes that because the Plaintiffs have failed to respond to the motion to dismiss, they have not raised the issue of whether the accident occurred incident to military service. Nonetheless, the Court sees fit to address this issue before granting the Defendants' motion. When applying the *Feres* doctrine, the Court must consider three factors in determining whether the activity of serviceman at the time of the injury is incident to military service. These three factors are "(1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of the injury." *Kitowski*, 931 F.2d at 1528-29 (quoting *Pierce v. United States*, 812 F.2d 349, 353 (11th Cir. 1987)). Moreover, the duty status of the service member constitutes the most important criterion of the three factor analysis. *Jimenez*, 158 F.3d at 1229.

In the case *sub judice*, the decedent was a member of a Navy SEAL team that had just concluded training exercises with another Naval vessel. Clearly, Steven Voigt was a member of the armed forces and a naval serviceman at the time of the accident. Second, the injury occurred in a Government-owned Navy helicopter that was flying over the

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(Cont'd)

> It is well established that *Feres* bars recovery by family members where the cause of action is ancillary or derivative to the serviceman's action for his own injury received incident to military service. . . . Indeed, in *Feres* itself, two of the three suits barred were wrongful death actions instituted on behalf of widows of servicemen who had died from injuries suffered incident to service.

Arabian Gulf. Third, prior to the accident Steven Voigt and the rest of the crew of the Red Lion, were engaged in HVESS training with the USS NIAGRA FALLS. The accident occurred as the helicopter was awaiting permission to land. Although the crash allegedly occurred while the pilot conducted unauthorized aerial stunts after the training had concluded, the Court holds the accident was incident to military service. *See Kitowski*, 931 F.2d 1526 (holding that naval seaman who drowned during sea rescue training due to instructor forcing him underwater and holding him there until he turned blue and became unconscious was incident to service despite the egregious nature of the instructor's act).

B. *The Death on the High Seas Act and the Jones Act.*

The Defendants seek dismissal of Plaintiffs' entire case based on the *Feres* exception to the FTCA. However, they do not address Plaintiffs' claims under the Death on the High Seas Act and the Jones Act. Nevertheless, the Court concludes that the *Feres* doctrine also applies to these two claims.

In justifying the *Feres* doctrine, the Supreme Court has offered three policy rationales for immunizing the Government. First, "the nature of the relationship between the Government and members of the armed services requires a uniform federal remedy that does not vary upon the situs of the incident." *Blakey v. U.S.S. Iowa* 991 F.2d 148, 150-51 (4th Cir. 1993) (citing *Johnson*, 481 U.S. at 689). Second, Congress has already provided an "adequate, simple, certain, and uniform compensation system for injuries or death of

those in the armed services." *Id.* at 151 (citing *Johnson*, 481 U.S. at 689) . Third, the federal courts should avoid becoming involved with and second-guessing the military. *Id.* (citing *Johnson*, 481 U.S. at 690-91).

These factors apply equally in the context of various admiralty statutes. *Id.* at 151. In *Blakey*, the Court of Appeals for the Fourth Circuit held that the *Feres* doctrine applies to the Jones Act, the Suits in Admiralty Act, the Public Vessels Act, and the Death on the High Seas Act. *Id.* at 151-52. While this Court has not found a decision from the Eleventh circuit that addresses whether the *Feres* doctrine applies to both the Death on the High Seas Act and the Jones Act, the case law from other jurisdictions are in line with *Blakey*. *See e.g. Potts v. United States*, 723 F.2d 20, 21-22 (6th Cir. 1983) (denying jurisdiction under Suits in Admiralty Act and Public Vessels Act), *cert. denied*, 466 U.S. 959, 104 S. Ct. 2172, 80 L. Ed. 2d 555 (1984); *Hillier v. Southern Towing Co.*, 714 F.2d 714, 721 (7th Cir. 1983) (denying jurisdiction under Suits in Admiralty Act); *Cusanelli v. Klaver*, 698 F.2d 82, 85 (2nd Cir. 1983) (denying jurisdiction under Public Vessels Act); *Charland v. United States*, 615 F.2d 508, 509 (9th Cir. 1980) (denying jurisdiction under Public Vessels Act); *Beaucoudray v. United States*, 490 F.2d 86, 86 (5th Cir. 1974) (denying jurisdiction under Suits in Admiralty Act and Public Vessels Act). In fact, this Court has held that the *Feres* doctrine bars claims of servicemen under the Suits in Admiralty Act and the Public Vessels Act. *Peterson v. United States*, 1986 WL 15639 *5 (S.D. Ga. 1986). Applying this reasoning to the present case, the Court concludes that Plaintiffs' claims under the Death on the High Seas Act and the Jones Act are also barred by the *Feres* doctrine.

Appendix B

CONCLUSION

Without a doubt the crash that took the life of Steven Voigt was a tragic accident to which the Court offers its sympathy Congress has not seen fit to amend the FTCA to permit individuals serving their country to recover for accidents arising out of their service. Until that time, the Court is required to apply the *Feres* doctrine. Pursuant to the *Feres* doctrine, the Court maintains no jurisdiction over this matter. Accordingly, the Court **GRANTS** the Defendants' Motion to Dismiss as to all the claims. The Court **DIRECTS** the Clerk's Office to **CLOSE THIS CASE** and enter an appropriate judgement of dismissal.

So ORDERED, this 26th day of January, 1999.

s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 17, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8164-EE

FRED W. VOIGT, Individually and as Personal Representative of the Estate of Steven Mark Voigt, Deceased, ANN M. VOIGT, STEVEN MARK VOIGT, JR.,

Plaintiffs-Appellants,

versus

DEPARTMENT OF THE NAVY, U.S.S. ENTERPRISE CVN 65, UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BLACK and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants, Fred W. Voigt, et al., is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES SENIOR CIRCUIT JUDGE